Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

No. 93-1741

In The

Supreme Court of the United States

October Term, 1993

SEARS, ROEBUCK AND CO.,

Petitioner,

versus

NEWPORT LIMITED,
A PARTNERSHIP IN COMMENDAM,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION OF NEWPORT LIMITED TO PETITION BY SEARS, ROEBUCK AND CO. FOR WRIT OF CERTIORARI

PHILLIP A. WITTMANN
STEPHEN H. KUPPERMAN*
GEORGE C. FREEMAN, III
ALEX J. PERAGINE
Of
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Attorneys for Respondent, Newport Limited, A Partnership in Commendam

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether review on writ of certiorari is appropriate where:

1. The district court did not hold any evidence to be inadmissible;

2. The appellate court expressly found that no evidence had been excluded as inadmissible;

3. No conflict exists with any decision of this Court or of other circuits;

4. The issue involved is whether in this particular case the evidence presented in opposition to a motion for summary judgment is sufficient to withstand the grant of such motion.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Carden v. Arkoma Associates, 494 U.S. 185, 110 S. Ct. 1015 (1990) 2

Christophersen v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1280 (1992) 11

Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp., 986 F.2d 1463 (5th Cir. 1993) 11

Cotton Bros. Baking Co. v. Industrial Risk Insurers, 941 F.2d 380 (5th Cir. 1991) 11

Crawford v. Gray & Associates, 493 So. 2d 734 (La. App. 2nd Cir.), *cert. denied*, 497 So. 2d 1012 (1986) 11

Daubert v. Merrell Dow Pharmaceuticals, Inc., ___ U.S. ___, 113 S. Ct. 2786 (1993) ..... *passim*

Folds v. Red Arrow Towbar Sales, 378 So. 2d 1054 (La. App. 2nd Cir. 1979) 13

Galloway v. Tenneco Oil Co., 313 So. 2d 317 (La. App. 4th Cir.), *cert. denied*, 318 So. 2d 42 (1975) 11

Koncinsky v. Smith, 390 So. 2d 1377 (La. App. 3rd Cir. 1980) 13

Lavigne v. J. Hofert Co., 431 So. 2d 74 (La. App. 1st Cir. 1983) 13

Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994) 10

Newport Limited v. Sears, Roebuck and Co., 6 F.3d 1058 (5th Cir. 1993) ..... *passim*

Newport Limited v. Sears, Roebuck and Co., 739 F. Supp. 1078 (E.D. La. 1990) 2

TABLE OF AUTHORITIES – Continued

Page

Newport Limited v. Sears, Roebuck and Co., 941 F.2d 302 (5th Cir. 1991), *cert denied*, ___ U.S. ___, 112 S. Ct. 1175 (1992) 2

Newport Limited v. Sears, Roebuck and Co., No. 86-2319 (E.D. La. September 9, 1992) 3

Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 80 S. Ct. 173 (1959) 7

United States v. Johnston, 268 U.S. 220, 45 S. Ct. 496 (1925) 8

Wilcox v. United States, 983 F.2d 1071 (6th Cir. 1992) 6

STATUTES AND RULES

28 U.S.C. § 1331 2

28 U.S.C. § 1332 1

Rule 10 of the Supreme Court of the United States 4

Rule 10.1 of the Supreme Court of the United States 5, 7, 9

Rule 10.1(a) of the Supreme Court of the United States 5, 6

Rule 10.1(c) of the Supreme Court of the United States 5

Rule 12(b)(6) of the Federal Rules of Civil Procedure 2

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq* 2

MISCELLANEOUS

2 R. Dunn, *Recovery of Damages for Lost Profits* (1992) 11

No. 93-1741

In The

Supreme Court of the United States

October Term, 1993

SEARS, ROEBUCK AND CO.,

Petitioner,

versus

NEWPORT LIMITED,
A PARTNERSHIP IN COMMENDAM,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

OPPOSITION OF NEWPORT LIMITED TO PETITION BY SEARS, ROEBUCK AND CO. FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Newport filed this action against Sears in 1986, alleging violations of state law and demanding a jury trial. [R. 305.] Jurisdiction was founded on diversity of citizenship. 28 U.S.C. § 1332. Early in the suit, Sears moved for summary judgment on all claims; the district court denied the motion because "disputed genuine issues of material fact exist as to the intent and performance of the parties." [R. 741.]

In October 1988, Newport added a claim for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, thus invoking federal question jurisdiction. 28 U.S.C. § 1331. [R. 3228.] In November 1988, Sears filed a Rule 12(b)(6) motion to dismiss the RICO claim, followed in February 1989 by its second motion for summary judgment on all claims. [R. 3893 and R. 4178.] After 14 months, the district court dismissed the RICO claim; at the same time, it concluded that the parties were not diverse under *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S. Ct. 1015 (1990). *Newport Limited v. Sears, Roebuck and Co.*, 739 F. Supp. 1078 (E.D. La. 1990). The lower court then declined to exercise pendent jurisdiction, dismissed as moot Sears' second motion for summary judgment, and dismissed the state law claims without prejudice. *Id.*, at 1084.

Both parties appealed. The Fifth Circuit upheld dismissal of the RICO claim and agreed with the lower court's determination that the parties were not diverse. The court concluded, however, that the district judge had abused his discretion by dismissing the pendent state law claims. *Newport Limited v. Sears, Roebuck and Co.*, 941 F.2d 302, 308 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1175 (1992). The matter was remanded to the district court.

In May 1992, Sears filed its third motion for summary judgment, advancing the identical arguments and supporting exhibits that it had relied upon in its February 1989 motion. At no time did Sears move to exclude Newport's expert evidence on the issue of damages. Nor did Sears present contrary damage evidence, or challenge the methodology utilized by Newport's expert. Nonetheless,

on September 9, 1992, the district court granted Sears' motion and entered judgment dismissing all claims. *Newport Limited v. Sears, Roebuck and Co.*, No. 86-2319, slip op. (E.D. La. September 9, 1992). [Appendix to Sears' Petition, at 25a.]

Newport appealed. On October 29, 1993, the Fifth Circuit issued its ruling reversing the grant of summary judgment and remanding for trial on the merits as to all claims. The appellate court expressly found that Newport had raised genuine issues of material fact from which a jury could reach a conclusion favorable to Newport. *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058 (5th Cir. 1993). [Appendix to Sears' Petition, at 1a.] On the issue of damages, the Fifth Circuit specifically declared that "we hold that Newport's evidence, which Sears failed to rebut, raised a genuine issue of material fact." [*Id.*, at 22a.]

Sears petitioned for panel rehearing and suggested rehearing *en banc*. As the primary thrust for its suggestion for rehearing *en banc*, Sears argued that Newport's evidence of damage had been deemed inadmissible by the district court. Apparently in response to this new argument, but without changing its holding, on January 28, 1994 the unanimous Fifth Circuit panel of Judges Higginbottham, King and DeMoss clarified its earlier ruling. This clarification made clear the Fifth Circuit's rejection of Sears' argument that Newport's expert evidence had been deemed inadmissible, noting that "here, the district court has not excluded expert evidence as inadmissible. . . . " [*Id.*]

Several days later, Sears' petition for panel rehearing was denied. [*Id.*, at 56a.] Moreover, "no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, . . . the Suggestions for Rehearing En Banc are DENIED." [*Id.*] On May 2, 1994, Sears filed this Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

1. The court of appeals' decision does not conflict with any decision of this Court, and this case does not present any special or important reason for the grant of a writ of certiorari. [Rule 10 of the Supreme Court of the United States.]

2. At no time was Newport's expert testimony as to damages excluded or deemed inadmissible. The issue before the district court was sufficiency, not admissibility.

3. Sears misconstrues the record. The Fifth Circuit did not ignore but rather directly addressed the issue of admissibility, and determined that the district court had "not excluded expert evidence as inadmissible." *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058, 1069 (5th Cir. 1993).

4. In essence, Sears seeks a writ of certiorari so that this Court can determine whether, on the facts and record of this specific case, a court of appeals has properly construed a ruling of a trial court. Such issue does not warrant the grant of a writ of certiorari.

5. In any event, Sears did not establish that Newport's expert testimony on damages should be excluded. The testimony was relevant and reliable. Newport's expert utilized a well-founded methodology and relied on the type of data other experts in the field rely on in forming opinions on the subject. Sears, on the other hand, offered no evidence whatsoever that the expert's factual basis was inaccurate or that his methodological approach was incorrect.

ARGUMENT

Review on writ of certiorari "is not a matter of right," but "will be granted only when there are special and important reasons therefor." [Rule 10.1 of the Supreme Court of the United States.] Thus, review often is limited to the situation in which a court of appeals "has decided a federal question in a way that conflicts with applicable decisions of this Court" [*id.*, Rule 10.1(c)], or "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." [*Id.*, Rule 10.1(a).] Given those considerations, review on writ of certiorari is not appropriate here.

Sears seeks review essentially by declaring that the Fifth Circuit decision below is "in conflict with the recent decision of this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S. Ct. 2786 (1993)."

[Sears' Petition at (i).][1] Sears attempts to confect a conflict by asserting that the trial court specifically excluded Newport's expert testimony on damages, and that the Fifth Circuit erred both by refusing to acknowledge this exclusion and by considering such testimony without first determining the reliability of the expert opinions or reviewing the district court ruling for manifest error. Sears' entire argument thus rests on the assumption that the district court found Newport's expert evidence on damages to be inadmissible.

---

[1] Although Sears purports to present two questions for consideration, in fact the second question is dependent on the answer to the first. In the second question, Sears rhetorically asks whether summary judgment may be defeated by court speculation "as to evidence the opposing party might hypothetically offer at a subsequent trial, rather than limiting itself to the evidence actually proffered in opposition to the motion for summary judgment?" [Sears' Petition at (i).] Obviously, reliance on hypothetical future evidence is inappropriate, *see, e.g., Wilcox v. United States*, 983 F.2d 1071, 1073 (6th Cir. 1992); Newport does not contend otherwise. Sears' position that the Fifth Circuit relied on hypothetical future evidence, however, is founded on its incorrect view that all damage evidence presented was deemed inadmissible by the district court, and thus that denial of summary judgment necessarily had to be founded on evidence not yet in the record. Because the district court did not rule any expert evidence inadmissible, as the appellate court expressly noted, the grant of summary judgment properly was reversed based on evidence actually presented, not on undefined, hypothetical evidence that might be offered at some later date. At no time did the appellate court depart from "the accepted and usual course of judicial proceedings" so as "to call for an exercise of this Court's power of supervision." [Rule 10.1(a) of the Supreme Court of the United States.]

Sears' assumption is unfounded. The issue in dispute below was sufficiency of evidence on a motion for summary judgment, not admissibility. The district court did not exclude Newport's expert testimony as to damages. Indeed, Sears never challenged the admissibility of Newport's expert reports and related evidence, and never moved to exclude any evidence offered by Newport in opposition to Sears' third motion for summary judgment.[2] The lower court merely found Newport's evidence to be of insufficient weight. The Fifth Circuit properly reviewed this determination and held that the evidence in fact was sufficient to withstand Sears' motion for summary judgment. The Fifth Circuit's conclusion was not surprising, given that Sears submitted no evidence – expert or otherwise – to challenge Newport or to support summary judgment on damages. Because questions concerning an appellate court's determination of the sufficiency of evidence generally do not present the "special and important reasons" for which certiorari is reserved [Rule 10.1 of the Supreme Court of the United States], Sears' request for review should be denied. *See, e.g., Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 111, 80 S. Ct. 173, 176 (1959) (Stewart, J., concurring) (review of case "in which the sole issue is sufficiency of

---

[2] Sears first questioned the admissibility of Newport's expert evidence on appeal, after seven years of litigation. The Fifth Circuit found *Daubert* and *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1280 (1992), inapposite because the issue here concerns sufficiency, not admissibility. The appellate court expressly noted that "the district court has not excluded expert evidence as inadmissible." *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058, 1069 (5th Cir. 1993). [Appendix to Sears' Petition, at 22a.]

the evidence seems . . . not only to disregard the Court's proper function, but to deflect the Court's energies from the mass of important and difficult business properly here"); *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.")

Moreover, the district court's conclusion of insufficiency as to damages was founded in large part on an erroneous view of the law on the issue of liability. For example, the lower court held that, as a matter of law, "the parties never agreed upon a final lease agreement and [therefore] any damages arising from Sears' alleged 'withdrawal' would derive from conjecture and speculation." [R. 6284-6318 (Slip Op.) at 33 (Appendix to Sears' Petition, at 53a); *see also id.*, at 33 n.9.] The Fifth Circuit, however, rejected the conclusion that there was no "final lease agreement" as a matter of law. *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058, 1067 (5th Cir. 1993). [Appendix to Sears' Petition, at 14a-16a.] Because Sears does not challenge that reversal here, the district court's grant of summary judgment therefore is without sufficient foundation in any event.

Sears attempts to create a conflict with *Daubert* by twisting the district court's decision from something it was – a reversible ruling based on erroneous conclusions regarding the law and the sufficiency of the evidence – into something it was not – an evidentiary ruling excluding certain testimony. Sears asserts, for example, that district court language pertaining to that court's perception of the sufficiency of evidence "necessarily" meant that the court "found the evidence offered by Newport to be inadmissible." [Sears' Petition at 8.] Sears, however,

fails to cite to a single explicit ruling in the record actually holding Newport's expert evidence to be inadmissible.

Sears also attempts to create a conflict with *Daubert* by claiming that the appellate court "inexplicably refused to even acknowledge" and "failed to address" the issue of admissibility. [*Id.*, at 9.] Sears is incorrect, and its position both is disingenuous and borders on a misrepresentation to this Court. The issue of admissibility, rather than being "ignored" [*id.*, at 10], was directly addressed by the Fifth Circuit, which declared that "here, the district court has not excluded expert evidence as inadmissible." *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058, 1069 (5th Cir. 1993). [Appendix to Sears' Petition, at 22a.]

Based on this clear Fifth Circuit pronouncement, a careful reading of Sears' Petition reveals that Sears merely disagrees with the Fifth Circuit's conclusion that the expert evidence was never held inadmissible. The record, however, is devoid of any indication that Sears ever moved to exclude such evidence, or that the district court ever expressly stated such evidence to be inadmissible. The Fifth Circuit's determination clearly is correct. Even if it were not, however, a party's disagreement with an appellate court's analysis of whether a lower court made a particular ruling does not involve important principles of law, protect public interests, or create true conflicts with prior decisions of this Court.[3] In short, Sears'

---

[3] That the issue presented by Sears is one based on the facts and record of this particular case, and does not constitute the "special and important reasons" for which certiorari is reserved [Rule 10.1 of the Supreme Court of the United States], is

complaint does not rise to the level of importance ordinarily reserved for review on a writ of certiorari.

It is worth noting, too, that Sears has not established – and, indeed, cannot establish – that Newport's expert testimony on damages should be excluded.[4] Under *Daubert*, Sears could establish that the testimony is inadmissible by showing that it is irrelevant, that it is unreliable, or that its prejudicial value substantially outweighs its probative value. 113 S. Ct. at 2794-95, 2798-99. Sears has never argued that Newport's expert testimony is irrelevant or unfairly prejudicial. Nor has Sears established that Newport's expert testimony is unreliable.

The reliability of expert testimony may be established in a variety of ways. Generally, reliability is established

---

reflected in the fact that the Fifth Circuit at no time has attempted to depart from the standard or dictates set forth by this Court in *Daubert v. Merrell Dow Pharmaceuticals*, ___ U.S. ___, 113 S. Ct. 2786 (1993). Indeed, the Fifth Circuit has given every indication of strict adherence to *Daubert*. *E.g.*, *Marcel v. Placid Oil Co.*, 11 F.3d 563, 567 (5th Cir. 1994) (affirming district court exclusion of expert evidence under *Daubert*).

[4] Even with the expert testimony excluded, however, the Fifth Circuit's opinion would remain correct. On summary judgment, Sears bears the burden of demonstrating an absence of genuine dispute as to material facts, a burden Sears failed to meet. Indeed, the record is replete with evidence of Newport's damages, even without reference to the expert's opinion, thereby establishing factual issues. The evidence shows, for example, that Newport expended substantial sums to clear the site for the Sears facility, to prepare access to the site from the public highways, to procure Foreign Trade Zone status for the Sears facility, and to undertake numerous other efforts to prepare the site. [R. 5052 at Exh. 4; R. 6155 at Exhs. 57 and 88.]

by showing that the expert used a well-founded methodology and that he relied on the same type of data other experts in the field rely on in forming opinions on the subject. *See, e.g., Daubert*, 113 S. Ct. at 2795; *Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp.*, 986 F.2d 1463, 1476 (5th Cir. 1993); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1110-11 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1280 (1992). Newport's expert reports and testimony are based on multiple regression analyses, which experts agree provide a "powerful tool for . . . measuring damages in lost profits cases." 2 R. Dunn, *Recovery of Damages for Lost Profits*, § 9.2, at 536 (1992); *see also Cotton Bros. Baking Co. v. Industrial Risk Insurers*, 941 F.2d 380, 391 (5th Cir. 1991) (upholding jury award of lost profits based on expert economist's regression analysis). Moreover, Newport's expert reports are based on a thorough examination of comparable projects, invoices, and public documents prepared by public bodies, which is the type of data experts consider in forming opinions on damages. *See, e.g., Crawford v. Gray & Associates*, 493 So. 2d 734, 744 (La. App. 2nd Cir.), *cert. denied*, 497 So. 2d 1012, 1013 (1986) (expert testimony on lost profits based on financial performance of comparable convenience stores); *Galloway v. Tenneco Oil Co.*, 313 So. 2d 317, 322 (La. App. 4th Cir.), *cert. denied*, 318 So. 2d 42 (1975) (expert testimony on lost profits based on profits derived from comparable land sales).

Newport offered the testimony of an expert economist, Dr. Michael Conte, who earned a bachelors degree in economics from Yale University and both a masters and a doctoral degree in economics from the University

of Michigan. Dr. Conte quantified three categories of damage: (1) out-of-pocket costs, (2) lost future profits, and (3) lost public monies. Newport's claims for out-of-pocket expenses were established through Dr. Conte's careful review of hundreds of invoices documenting expenses incurred by Newport because of Sears' misrepresentations and its failure to proceed in good faith. [R. 6155 at Exhs. 112 and 113.] Lost public monies were directly calculated by Dr. Conte, based on the terms of the federal and state grants to Newport that were contingent on Sears proceeding in good faith. [R. 6155 at Exhs. 57, 110, 114 and 155. *See also* R. 6155 at Exhs. 81 and 88.] To calculate lost profits, Dr. Conte examined extensive data relating to over 600 business, industrial, and mixed-use parks that opened throughout the United States since 1980. [*Id.* at Exh. 116, pp. 158-61.] To calculate an absorption rate (a rate of development) for a park with Newport's characteristics, he performed eight separate regression analyses to identify facilities that closely resembled Newport's. [*Id.* at Exh. 116, pp. 164-68.][5] Dr. Conte further tested for the impact of geographic location, and concluded that the absorption rates for industrial parks in the area encompassing Newport Industrial Park were not statistically distinguishable from those for the country overall. [*Id.* at Exh. 117, pp. 126-28.]

---

[5] The characteristics Dr. Conte determined to be the most significant were that the park (1) have access to rail transportation, (2) have access to water transportation, (3) have the capacity to house offices, (4) have little distance to a highway, (5) be a mixed-use business park, (6) not be a research park, and (7) not be a fly-in park.

After a thorough analysis of the data and performance of the regression analyses, Dr. Conte calculated an absorption rate for the Newport facility. [*Id.* at Exh. 111, attached Exh. B, No. 2.] Using this absorption rate, Dr. Conte calculated Newport's gross profits. [*Id.* at Exh. 111, attached Exh. A.] Dr. Conte then reduced the gross profits by traditional factors of development, promotional and related overhead costs to calculate net profits, and then discounted those profits to present value. [*Id.* at Exh. 111, attached Exh. B, No. 2].

The general rule in Louisiana is that, "while damages for lost profits may not be based on speculation and conjecture they need only be proven within a reasonable certainty." *Folds v. Red Arrow Towbar Sales*, 378 So. 2d 1054, 1059 (La. App. 2nd Cir. 1979). Under Louisiana law, "[b]road latitude is given in the proving of lost profits as damages." *Lavigne v. J. Hofert Co.*, 431 So. 2d 74, 76 (La. App. 1st Cir. 1983). Moreover, once Newport proves by a preponderance of the evidence that Sears' wrongful conduct caused some loss of anticipated profits, the jury has discretion to determine the amount, so long as there is some reasonable basis for the determination. *Koncinsky v. Smith*, 390 So. 2d 1377, 1383 (La. App. 3rd Cir. 1980).

In light of these standards, Newport adduced substantial evidence, including expert testimony, on damages. By contrast, Sears offered no evidence whatsoever, whether contrary factual evidence or evidence that the methodological approach of Newport's expert somehow was incorrect. The Fifth Circuit correctly noted that Sears "failed to rebut" Newport's evidence, and remanded for trial on the merits. *Newport Limited v Sears, Roebuck and Co.*, 6 F.3d 1058, 1070 (5th Cir. 1993). [Appendix to Sears'

Petition, at 22a.] Sears was and is not entitled to summary judgment on damages, and its petition for a writ of certiorari should be denied.

CONCLUSION

Sears seeks review on writ of certiorari on the premise that the district court made a specific evidentiary ruling excluding certain expert testimony, and that the Fifth Circuit ignored that ruling, in conflict with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S. Ct. 2786 (1993). In fact, however, the district court did not render any evidentiary ruling that excluded expert testimony. Rather, the district court considered that expert testimony, merely finding it insufficient to support a claim for damages. The Fifth Circuit specifically considered the issue raised by Sears regarding admissibility, finding that "the district court has not excluded expert evidence as inadmissible." *Newport Limited v. Sears, Roebuck and Co.*, 6 F.3d 1058, 1069 (5th Cir. 1993). Moreover, the Fifth Circuit reviewed the district court determination of insufficiency, held that the evidence was in fact sufficient to withstand Sears' motion for summary judgment, and reversed the district court. The ruling of

the Fifth Circuit creates no conflict with *Daubert* or other precedent. A review on writ of certiorari is not warranted.

Respectfully submitted,

PHILLIP A. WITTMANN
STEPHEN H. KUPPERMAN*
GEORGE C. FREEMAN, III
ALEX J. PERAGINE
Of
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Attorneys for Respondent,
Newport Limited,
A Partnership in Commendam

* Counsel of Record